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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1968

NO. 613

Thomas W. McArthur et. al.,

Petitioners,

vs.

Clark Clifford, Secretary of Defense, and
Stanley Resor, Secretary of the Army et. al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit denying a restraining order in this case--which judgment was entered on September 25, 1968--and to review the underlying substantive issues upon which the Court of Appeals based its denial of a restraining order.

Opinions Below

The judgment of the Court of Appeals denying a restraining order is unreported. It is printed in the Appendix, infra, at page 1A. The order of the District Court dismissing petitioners' case is also unreported, and it appears in the Appendix, infra, at page 2A.

Jurisdiction

The judgment of the Court of Appeals was entered on September 25, 1968 (App. infra, p. 1A). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

Petitioners are Army Reservists who enlisted in the Reserve before October 1966, and who, at the time of their enlistments, signed contracts specifying the conditions under which they could be called to active duty. Petitioners have been called to

active duty under the authority of Public Law 89-687, which was enacted in October 1966 and which expanded the conditions under which petitioners could be called to active duty. Petitioners are being sent to Viet Nam before they have an opportunity to assert their legal rights in court and the Court of Appeals has refused to issue a restraining order that would prevent the petitioners from being sent to Viet Nam. Under these circumstances, the questions presented are:

1. Whether Public Law 89-687 unconstitutionally delegates legislative power to the Executive.

2. Whether petitioners are being deprived of their liberty without due process because, by expanding the conditions under which petitioners could be called to active duty, P. L. 89-687 and the government's actions thereunder retroactively impaired the obligations of the government's contracts with petitioners.

3. Whether the respondents' action in sending petitioners to fight in a long sustained and large scale undeclared war in Viet Nam violates Article I, Section 8, Clause 11 of the Constitution, which states that the Congress shall have the power to declare war.

4. Whether, in calling petitioners to active duty despite the fact that they have heavy family responsibilities, the government violated P.L. 89-687(d), which provides that the Executive shall give appropriate consideration to family responsibilities in deciding which reservists to call to active duty.

5. Whether, prior to the date on which petitioners were called to active duty, P.L. 89-687 was repealed by implication by the Military Selective Service Act of 1967, and, more specifically, by Section 673(a) of that act (Public Law 90-40; U.S. Code Cong. & Admin. News, 90th Cong. 1st Sess., Vol 1, p. 113.

6. Whether the Court of Appeals should have granted petitioners' request for a temporary restraining order because, in the absence of such an order, petitioners may suffer the grievous and irreparable injury of being killed or seriously wounded in Viet Nam before they have an opportunity to assert their rights in court.

Statutes And Constitutional Provisions Invoked

Public Law 89-687, 80 Stat. 980-981 (1966), provides in pertinent part:

(a) Notwithstanding any other provision of law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who--

(1) is not assigned to, or participating satisfactorily in, a unit in the Selected Reserve, and

(2) has not fulfilled his statutory reserve obligation, and

(3) has not served on active duty or active duty for training for a total of twenty-four months.

(b) Notwithstanding the provisions of any other law, until June 30, 1968, the President may order to active duty any member of the Ready Reserve of an armed force who had become a member of a reserve component prior to July 1, 1966; and who

(1) has not served on active duty or active duty for training for a period of one hundred and twenty days or more, and

(2) has not fulfilled his statutory reserve military obligation.

(c) A member ordered to active duty under this section may be required to serve on active duty until his total service on active duty or active duty for training equals twenty-four months. If the enlistment or period of military service of a member of the Ready Reserve ordered to active duty under subsection (a) or (b) of this section would expire before he has served the required period of active duty prescribed herein, his enlistment or period of military service may be extended until that service on active duty has been completed.

(d) In order to achieve fair treatment as between members in the Ready Reserve who are being considered for active duty under this section,

appropriate consideration shall be given to--

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest.

(e) Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months.

Public Law 90-40, 81 Stat. _____ (1967), provides in pertinent part:

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who--

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

(b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.

(c) To achieve fair treatment among members of the Ready Reserve who are being considered for active duty under this section, appropriate consideration shall be given to--

(1) family responsibilities; and

(2) employment necessary to maintain the national health, safety, or interest; and

(3) by inserting the following item in the analysis: "673a. Ready Reserve: members not assigned to, or participating satisfactorily in, units." Approved June 30, 1967.

Article I, Section 8, Clause 11 of the United States Constitution provides in pertinent part:

The Congress shall have power . . . To Declare War . . . .

. . . . . .

Statement

Petitioners are fifty seven members of the Army Reserve who have been called to active duty. Petitioners serve with the 842d Quartermaster Company, stationed at Fort Lee, Virginia. On the average, petitioners are between twenty-four and twenty-seven years old, are married, have children, and, before being called to active duty, held steady jobs. Under orders received in August, petitioners must be ready to embark for Viet Nam on or shortly after September 29, 1968; petitioners' equipment embarked for Viet Nam at the end of August.

Petitioners joined the Army Reserve prior to October, 1968. When they joined, petitioners signed two contracts--an Enlistment Contract and a Reserve Component Service Agreement--which contain the terms under which they are to serve. Under these contracts, petitioners, soon after their enlistments, were to serve approximately five to six months on active duty for the purpose of being trained. After serving on active duty for this period--which petitioners did--they were to spend the rest of their service in the Reserve. They could, however, be called back to active duty in accordance with Paragraph fifty three of their enlistment contracts; which provided that, in time of war or national emergency declared by Congress or when otherwise authorized by law, petitioners could be called to active duty for the duration of the war or national emergency [declared by Congress] and for six months thereafter.[1] When they joined the Reserve, petitioners were given to understand that, in the absence of a war declared by Congress or a national emergency declared by Congress, they would not be called to active duty after their initial period of training.

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[1] Paragraph 53 of petitioners' Enlistment Contracts says: I understand that, upon enlistment in a Reserve component of any of the Armed Forces of the United States, or upon transfer or assignment thereto, in time of war or National emergency declared by Congress, or when otherwise authorized by law, I may be ordered to active duty for the duration of the war or National emergency and for six months thereafter.

On April 11, 1968, petitioners were notified that their reserve unit, the 842d Quartermaster Company was being called to active duty, effective May 13, 1968. Petitioners were called to active duty under the authority of P.L. 89-687, 80 Stat. 980-981, which was enacted in October 1966. Petitioners reported for active duty on the scheduled date of May 13, and they subsequently received eleven weeks of training in the techniques of supplying petroleum to combat units--a type of training which they had not previously received--and one week of training in how to defend themselves against chemical, biological and radiological warfare. At the conclusion of their training, petitioners received orders that their unit and its equipment were to undergo a permanent change of station. Pursuant to these orders, the equipment was packed and shipped to Viet Nam in late August 1968 and petitioners are to be ready to go to Viet Nam on or shortly after September 29, 1968.

On September 25, petitioners filed a complaint in the District Court for the Eastern District of Virginia. The complaint sought a temporary restraining order, a subsequent preliminary injunction and, after a final determination of the case, a permanent injunction, requiring that respondents not transfer petitioners to any place outside the territorial United States and ordering that petitioners be released from active duty. In the alternative, petitioners sought a writ of habeas corpus ordering respondents to justify to the court their continued retention of petitioners on active duty and petitioners requested that the court adjudicate the legality of their retention. On September 25, the District Court denied petitioners' request for a restraining order and dismissed the request for the alternative relief of a preliminary injunction or a writ of habeas corpus (App. infra, p. 1).

Petitioners then filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, and they also filed a motion requesting that the Court of Appeals issue a temporary restraining order preventing respondents from transferring them outside of the United States pending appellate review of the decision of the District Court. After a hearing, Circuit Judge Butzner, on September 25, denied petitioners' motion for the temporary restraining order. Judge Butzner's reason for denying it was "that the issues raised in this appeal are identical to those considered in Morse v. Boswell, No. 12,738, 4th Cir., August 26, 1968, and for this reason the appellants' cause lacks equity."[2]

Argument

1. In this petition, petitioners have raised six legal questions: whether legislative power has unconstitutionally been delegated to the Executive, whether petitioners are being deprived of liberty without due process because the government's obligation of contract has been retroactively impaired, whether the war in Viet Nam is unconstitutional because Congress has not declared either a limited or general war, whether the Executive violated the terms of P.L. 89-687 when it called men with heavy family responsibilities to active duty, whether P.L. 89-687 was repealed by implication, and whether a temporary restraining order should be granted when, in its absence, men may suffer irreparable death or injury before having an opportunity to assert their rights in court. As shall be discussed at greater length below, there can be no doubt that at least some of these six legal questions are, or should be, of critical significance in this country. For

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[2] Particularly because they are scheduled to embark for Viet Nam on or shortly after September 29, 1968, petitioners have thought it essential to file their petition for writ of certiorari prior to October 7, the beginning date of the October 1968 term of this Court. In order to accomplish this, the petition had to be filed no later than Friday, October 4. There was insufficient time between Judge Butzner's decision of September 25 and the October 4 filing deadline to have this petition for certiorari printed and bound in a volume having pages 6 1/8 inches by 9 1/4 inches. Therefore, the petition had to be filed in an unbound form on pages which are 8 1/2 inches by 14 inches. Petitioners move that the Court accept this petition in its present form. Petitioners further move that, should a writ of certiorari be granted, this Court restrain respondents from transferring petitioners outside of the continental United States pending the decision in this case.

example, it is hard to deny the crucial importance of the question whether, under the American Constitution, the Executive can carry on a long sustained and large scale war without a congressional declaration of either limited or general war. Similarly, it is hard to deny the importance of the question whether it is constitutional for the Congress to delegate its power to raise armies to the Executive by giving the latter the power to call reserves to active duty whenever he wishes to, unhampered by any Congressionally established standards as to what foreign or domestic conditions need exist before the Reserves can be called to active duty.

But while the six legal questions raised here present matters of crucial significance to the law and to the nation, there is a sense in which none of these six questions is the real issue in this case. For there is a sense, a deeply and tragically significant sense, in which the real issue concerns the role of the federal judiciary and the power of the President. The real question here is whether the President of the United States has become so powerful that his actions in certain areas of crucial constitutional and statutory importance are in effect no longer subject to being reviewed by the federal judiciary even though it can be strongly argued that his actions are illegal, and even though his actions are bringing serious injury or death to many persons. To put the matter in somewhat different words, the real issue here is whether, on the one hand, in certain areas of the national life the Presidency has grown so powerful that it is in effect above judicial review and is therefore above the law, or whether, on the other hand, the Presidency has not grown above the law in these areas because the federal courts still retain an effective power to review the constitutional and statutory legality of Presidential decisions.

Historically, the citizens of this nation have looked to the federal judiciary to protect their rights and to prevent the states or the federal government from visiting unlawful injuries upon them. From Marbury v. Madison, 1 Cranch 133 (1803), to Ex Parte Milligan, 71 U.S. 2 (1866), to Duncan v. Kahanamoku, 327 U.S. 304 (1946), to Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), to Brown v. Board of Education, 347 U.S. 483 (1954), to Cooper v. Aaron, 358 U.S. 1 (1958), to Reynolds v. Sims, 377 U.S. 533 (1964), Americans have relied on the federal judiciary, and more particularly, on this Court, to safeguard their rights. And, as this Court so well knows, the above list of great decisions is only fragmentary, for the roll call of great cases in which the judiciary has protected fundamental rights goes on and on.

But in regard to some of the most important legal issues regarding the war in Viet Nam, the federal judiciary has resolutely refused even to decide whether fundamental rights are being violated; and this refusal has occurred even though many Americans are suffering serious financial and physical injury or even death. In cases which have challenged the legality of the war under international law or under the United States Constitution, the courts have said that they will not pass on these issues: they have said that the cases must be dismissed because of the doctrines of standing, political questions, or sovereign immunity.[3] That these cases have been dismissed is not due to a lack of voices raised in reasonable and sometimes very powerful argument that the Viet Namese war violates international law, that it is unconstitutional, that it does not present a political question, etc. Scholars and Senators and others have made such arguments, at length and with care.[4]

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[3] See, e.g. Luftig v. McNamara, 252 F.Supp. 819 (1966), aff'd 373 F.2d 664 (1967), cert. den. Mora v. McNamara, 88 S.Ct. 282 (1967). Eminente v. Johnson, 361 F.2d 73, cert. den. 385 U.S. 929 (1966); Velvel v. Johnson, Civil Action No. T-4417 (D.C. Kan. 1968); Kalish v. U.S. No. 68-128-F (C.D.C. Cal. 1968).

[4] See, e.g. The Vietnam War and International Law (Falk ed., Princeton University Press, 1968); Wormuth, The Vietnam War: The President versus the Constitution, (A Center Occasional Paper published by The Center for the Study of Democratic Institutions, 1968); Velvel, The War in Viet Nam: Unconstitutional, Justiciable And Jurisdictionally Attackable, 16 Kan. L. Rev. 449 (1968).

Today the fifty seven petitioners in this case, who are being called upon to fight and perhaps to die in Viet Nam, add their voices to those others which have raised fundamental statutory and constitutional questions about Executive actions connected with the war in Viet Nam. Today the fifty seven petitioners in this case, like Americans of our own and bygone generations, look to the federal judiciary, and more particularly to this Court, for an opportunity to test their rights. They look to this Court in the hope that our constitutional balance of powers, which has served this nation so well for so long, will be preserved; i.e. in the hope that the Presidency has not become so powerful that, in critical areas of life, the Presidency is above the law in the sense that the constitutional and statutory legality of its decisions is in effect beyond the reach of judicial scrutiny even though strong arguments can be made against the legality of Presidential action and even though thousands of citizens are suffering serious injuries or even death.

When there are reasonable and perhaps even very powerful arguments supporting their point of view, men who may be called upon to render the supreme sacrifice should be permitted to raise their contentions in the courts. If this Court should issue a writ of certiorari and subsequently decide against petitioners on the merits, then so be it. For petitioners will have had an opportunity to exercise the deeply held American right to a day in court; and the rule of law means, as a Justice of this Court so recently pointed out, that even an adverse judicial decision must be obeyed.[4A] But it is critical to the rule of law and to our system that people <u>do</u> have a day in court--that they <u>do</u> have a chance to litigate the merits of their claims. Never was this more true than today, when, out of sheer frustration at being unable to obtain a hearing within the established institutions of society, people are carrying their grievances into the streets of our major cities. If we want people to stay within the orderly framework of our established institutions, as we surely do, then they must be given a hearing on their substantive claims within those established institutions.

[4A] Fortas, Concerning Dissent & Civil Disobedience, 30 (1968).

Petitioners in this case are law abiding members of the armed forces who, as said before, may be called upon to render the supreme sacrifice. They deserve a hearing on their substantive claims within our established institutions. Such a hearing would show that the balance of powers still stands as a guardian of liberty and that Presidential decisions which vastly affect citizens are not above the constraints of the law. Moreover, it bodes ill for America if law abiding citizens such as petitioners cannot obtain a hearing within our institutions. For such a result can only encourage other citizens, who unlike petitioners are disposed to go outside the framework of our institutions, to follow their penchant to violate the law in order to achieve their ends.

2. Turning now to the six legal issues raised by petitioners, it has long been an established principle of constitutional jurisprudence that Congress cannot delegate legislative power to the President without establishing standards to guide the Executive in exercising the delegated powers. Admittedly, there have been times, particularly in the realm of foreign affairs, when this Court approved delegations of power even though the standards which Congress laid down to guide the Executive were very broad in nature and gave the Executive great latitude as to the conditions under which he would exercise the delegated power and the manner in which he would exercise it. But never--not even in the field of foreign affairs--has this Court said that Congress can delegate legislative power to the Executive without <u>any</u> standard to guide him as to the conditions under which the delegated power can be exercised. On the contrary, the Court has made clear that, even in the area of foreign affairs, the Executive cannot be given unfettered discretion:

> "This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." <u>Zemel v. Rusk</u>, 381 U.S. 1, 17 (1965).

> "And if that power [to control exit from the country] is delegated, the standards must be adequate to pass scrutiny by the accepted tests." Kent v. Dulles, 357 U.S. 116, 129 (1958).[5]

In P.L. 89-687, however, the Congress has delegated its constitutional power to raise armies to the Executive without establishing any standards whatsoever as to the conditions which must exist before the Executive can exercise the delegated power. P.L. 89-687 gives the President the power to call reserves to active duty--which is an exercise of the legislative power to raise armies--but it contains not one word regarding whether there need be a national emergency declared by the Congress or the President before reservists can be called to active duty, whether there need be a declared or undeclared war before reservists can be called to active duty, whether there need be domestic violence, or whether any other foreign or domestic condition whatsoever need exist. The Executive is left free to call up reservists whenever, in its own unfettered discretion, it may choose to. Indeed, P.L. 89-687(e), the only provision of P.L. 89-687 under which the President had authority to call petitioners to active duty, specifically says the President may order any unit of the Ready Reserve to active duty "when he deems it necessary," i.e.[6] in his total discretion.

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[5] Also see Justice Brennan's concurring opinion in United States v. Robel, 88 S.Ct. 419 at 428-430 (1967).

[6] In addition to being given the power to call reservists to active duty under P.L. 89-687(e), the President was also given the power to call them to duty under P.L. 89-687(a) and (b). However, the President had no authority to call petitioners to active duty under Sections (a) or (b). Under (a), petitioners could not be called because they were participating satisfactorily in a unit in the Selected Reserve; and under (b) they could not be called because they had previously served on active duty for training for more than 120 days. (It might be noted that, while Sections (a) and (b) place mimimal restrictions on which reservists can be called to active duty, like the rest of statute they place no restriction whatsoever on the foreign or domestic conditions which must exist before the President can call reserves to active duty.)

Clearly, P.L. 89-687 violates even the most minimal conception of the rule that Congress must establish a standard when it delegates power to the Executive.

The absence of any standard as to what conditions must exist before the President can call reservists to active duty is particularly untoward in this case because here, unlike the situation in some cases where this Court approved rather broad standards,[7] it would have been quite easy for Congress to establish standards. Indeed, in prior statutes which governed the calling of reserves to active duty, Congress did establish standards. For example, 28 U.S.C. 672 provides that Reserves can be called to active duty in time "of war or national emergency declared by Congress;" 28 U.S.C. 673 provides that Reverves can be called to active duty "in time of national emergency declared by the President;" and 28 U.S.C. 674 provides that no unit of the standby reserve can be called to active duty in time of emergency unless it is first determined that there are "not enough of the required kinds of units in the Ready Reserve that are readily available" 28 U.S.C. 674(b)(1).

In light of the foregoing, it is manifest that P.L. 89-687 must be struck down by this Court if the doctrine of delegation of powers is to retain any vitality in our constitutional system.

3. It is well established that the federal government deprives a person of life, liberty or property without due process of law when it retroactively impairs its own obligations under a contract with such person. Lynch v. United States, 292 U.S. 571, 579 (1934); Perry v. United States, 294 U.S. 330, 350-354 (1935). In the present case, P.L. 89-687, and the Executive's action thereunder in calling petitioners to active duty, impair the obligations of the government's contracts with petitioners and therefore deprive them of liberty--and ultimately perhaps of life--without due process.

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[7] E.g. United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 319-321 (1936); Zemel v. Rusk, 381 U.S. 1, 17-18 (1965).

The Reserve Component Service Agreement signed by petitioners when they enlisted in the Reserve before October 1966 provided that they were immediately to spend approximately five to six months on active duty for training, and that the rest of their service would be spent in the Ready Reserve. The Enlistment Contracts which they signed provided that during a war or national emergency declared by Congress, or when otherwise authorized by law--e.g. when the President declared a national emergency, 10 U.S.C. 673, or when Congress itself determines that more reserves need be called to active duty, 10 U.S.C. 263 -- petitioners could be called to active duty for the duration of the war or national emergency. When they enlisted, petitioners were given to understand that, in accordance with their contracts, they would not be called to active duty in the absence of a war declared by Congress or a national emergency declared by Congress or the President. Under the contracts which it entered into with petitioners, therefore, the government has the obligation of not calling petitioners to active duty unless Congress declares war, Congress declares a national emergency, the President declares a national emergency or the Congress itself decides that Reserves need be called to active duty.

Petitioners acted in reliance on the government's obligation not to call them to active duty except under specified conditions. For at the time they enlisted, petitioners had the option of enlisting in the Regular Army, spending three years on active duty and not having to attend drills or summer camp after the three year period of active duty; volunteering for the draft, spending two years on active duty and not having to attend drills or summer camp after the two years of active duty; waiting to be drafted, then spending two years on active duty and not having to attend drills or summer camp after the two year period; or joining the Reserve, spending five to six months on active duty for training and thereafter attending at least forty-eight drills a year for the next five and one-half years,

attending summer camp each year for the next five and one-half years, and possibly being called to active duty during the next five and one-half years if there were a declared war or declared national emergency or Congress itself decided that Reserves need be called to active duty. Petitioners, most of whom are married, have children, and held steady jobs before being called to active duty, chose to join the Reserve, in many instances because this choice was most conducive to commencing families and careers in view of the fact that the government was obligated not to call petitioners to active duty in the absence of a declared war, declared national emergency, or Congressional call-up.

P.L. 89-687, enacted in October 1966, retroactively impaired the government's contractual obligation not to call petitioners to active duty in the absence of a declared war, a declared national emergency or a Congressional call-up. For under P.L. 89-687, petitioners can be called to active duty whenever the President wishes. Similarly, the President's action in calling petitioners to active duty in the absence of a declared war, declared national emergency or Congressional call-up also impairs the government's contractual obligations. The government's breach of its obligation means that petitioners have been placed in an unfair position. In order to facilitate an early beginning to their families and careers, petitioners chose to join the Reserve rather than the regular army. Petitioners knew they could be called to active duty, but only under certain specified conditions. Petitioners did begin their families and careers. But now their family life and careers have been drastically interrupted even though the conditions under which they could be called to active duty do not exist. In such a situation, the government's impairment of its contractual obligations surely violates due process.

Petitioners realize, of course, that there have been times when this Court has permitted governments to impair the obligations of their own contracts because such impairments were necessary to protect vital interests of the citizenry and to protect the general welfare under the police power. E.G.

City of El Paso v. Simmons, 379 U.S. 497 (1965). However, this is not a case where impairment is necessary to protect the citizenry. For if it was necessary to call Reserve units to active duty in order to fight in Viet Nam, such a call-up could easily have been accomplished in accordance with the government's contractual obligations to petitioners: the Congress itself could have decided that Reserves need be called to active duty, the Congress could have declared a limited war or national emergency, or the President could have declared a national emergency.

4. By sending petitioners to Viet Nam to fight in a long sustained and large scale undeclared war, respondents are violating Article I, Section 8, Clause 11 of the Constitution, which declares that the Congress shall have the power to declare war. The power to declare war was given to the Congress for very specific reasons. It had been suggested to the Constitutional Convention that the President be given the power to declare war, but the framers declined to do this because they feared the Executive might abuse such a power.[8] They feared that, if given the power to declare war, the Executive might involve us in "the calamities of foreign wars (1 M. Farrand, The Records of the Federal Convention, 316 (1911)) or might overstep constitutional bounds. They feared military supremacy and distrusted the idea that the Executive has greater wisdom than the legislature as to when the nation must go to war. They felt that executives, in the words of Abraham Lincoln, "had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object" (S. Rep. No. 797, 90th Cong. 1st. Sess. 11 (1967); Velvel supra at 451). They felt, as Justice Story said, that wars involve burdensome taxes and personal sufferings,

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[8]For the history of the adoption of the declaration of war clause, see the text of, and the material cited in, Velvel, The War In Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable, 16 Kan. L. Rev. 449, 450-452, 453-454.

are sometimes subversive of economic interests, and can destroy a nation. 2 Story, Commentaries On The Constitution Of The United States, 89-90 (2d ed. 1851). For all these reasons, the framers felt that, if America is to fight a war, it must be pursuant to an explicit Congressional decision to do so, a decision which would take the form of a Congressional declaration of limited or general war.

The reasons which impelled the framers to give Congress the power to declare war are still valid today. Wars still cause burdensome taxes and personal suffering; they still bring harm to economic interests; they still can destroy a nation. And American history and tradition still teach us, as they always have, to beware of military supremacy, to distrust the idea that the Executive has greater wisdom than the Congress as to when to fight a war, to fear that the Executive may overstep constitutional bounds when fighting a war, and to be wary of the "calamities of foreign wars." Since the ideas which caused the framers to give the power to declare war to Congress rather than the Executive are still valid, the declaration of war clause should be upheld in full vigor in order to insure that Americans are not subjected to the cruel sufferings of war unless the Congress explicitly decides that they should be and specifically records its decision in a declaration of limited or general war.

Congress has declared neither a limited nor a general war in Viet Nam. Thus by carrying on a large scale and long sustained war there, and by sending petitioners to fight in that war, the Executive is violating Article I, Section 8, Clause 11 of the Constitution. Of course, over the last few years the Executive has put forth arguments as to why it should have the constitutional power to fight a large war even though Congress has not declared war. These Executive arguments have been forcefully rebutted in Wormuth, The Viet Nam War: The President versus the Constitution (A Center

Occasional Paper, published by the Center for the Study of Democratic Institutions, 1968) and in Velvel, The War In Viet Nam, Unconstitutional, Justiciable and Jurisdictionally Attackable, 16 Kan. L. Rev. 449 (1968). Space limitations preclude setting forth these rebuttals in extenso, but petitioners shall briefly state a few of the more major points: (A) The President's power to repel attacks does not justify the current war. While the President can repel attacks on American forces or property without a declaration of war, he cannot go on to fight as large a war as he pleases for as long as he pleases subsequent to the attack, but must instead seek a Congressional declaration of war. For if the President did not have to seek a declaration before going on to fight a large war after repelling an attack, then he would have the power to begin a major holocaust in response to even a small attack on a single American soldier; and the declaration of war clause would be a dead letter. (B) The Tonkin Gulf Resolution, despite its broad wording, was not intended to authorize the current war, In passing the Resolution, Senators and Congressmen did not seek to authorize a large war. Rather, they thought the Resolution would prevent such a war by providing a warning to Viet Nam. Many of them said, furthermore, that there should be no strikes in North Viet Nam, that the Resolution does not authorize the landing of large land armies on the Asian continent, that we should avoid an expansion of the war, that the President was not being authorized to carry on a war but only to retaliate for attacks upon our forces, that there was to be no change in our limited role of providing equipment and advice to South Viet Nam, and that the Resolution was not a declaration of war. Indeed, if the Executive had not requested that the Resolution be passed very speedily in order to provide a quick warning to North Viet Nam, many influential legislators would have favored taking extra time in order to amend the Resolution so as to considerably narrow its broad wording. (C) Even if Congress

had intended to authorize the current war, which it assuredly did not, the Tonkin Resolution would be an unconstitutional delegation to the Executive of the Congressional power to declare war. For the Resolution gives the Executive total discretion, unfettered by any standards, to fight however large a war he pleases, whenever he pleases and wherever in Asia he pleases. (D) The SEATO treaty does not give the Executive the constitutional power to fight the war. For the treaty provides that, when another party is attacked, America, will respond in accordance with its "constitutional processes." Our constitutional processes provide that the Congress shall decide if we are to fight a war. Moreover, no treaty can override the Constitution (Reid v. Covert, 354 U.S. 1, 15-19 (1957)), and the SEATO treaty would therefore be unconstitutional if it gave the President the power to decide whether we shall fight a war. (E) That the Constitution makes the President the Chief Executive and bids him take care that the laws be faithfully executed does not give him the constitutional authority to fight the war. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), this Court pointed out that these constitutional phrases mean that the President must execute the laws of Congress, not that he can usurp Congress' functions. In the present case, the Executive has usurped Congress function of deciding whether a war should be fought. (F) That the President is Commander-in-Chief does not give him the power to usurp Congress' function of deciding whether to fight a war. Furthermore, as Commander-in-Chief the President's power is no more than that of a topranking officer - and no five star general or admiral can declare war. If the situation were otherwise, then, instead of civilian authority being superior to military authority, the President's military role would be supreme over the civilian authority having the power to declare war i.e. over the Congress. (G) The President's alleged

supremacy in foreign affairs does not give him the power to fight the war. For Congress too has large foreign policy powers, and entirely aside from the issue of which branch is supreme in foreign policy, the Constitution specifically gives Congress the power to declare war. (H) The President does not have the power to fight the war because of a need for urgency, expertise and secret information in deciding whether to fight. The need for urgency has been vastly overrated and, in any event, Congress can act quickly. The Executive can make secret information available to Congress. And Congress too can be expert on foreign affairs. (I) Congress has not ratified the war by appropriating money for Viet Nam. As this Court pointed out in Greene v. McElroy, 360 U.S. 474, 507 (1959), Congressional appropriations cannot implicitly ratify executive action of dubious constitutionality. Rather, explicit ratification is necessary in order to insure that the body having the constitutional responsibility to make a decision is the body which in fact does make it, and to insure that the decision is not made by a branch which does not have the authority to do so. The Greene principle is particularly applicable in regard to the fallacious argument that Congress has ratified the war by appropriating money. As a matter of common morality, the Congress could not refuse the money necessary to insure the safety of our men in Viet Nam; in such circumstances, appropriations cannot constitute approval and ratification. Moreover, Senators and Congressmen have specifically said that the appropriations are not to be regarded as approval or ratification of the war. Finally, if appropriating money constitutes implicit ratification, Congressmen may be encouraged, for obvious political reasons, to shirk their constitutional responsibility of explicitly declaring whether America shall fight a war. (J) It is fallacious to argue that declarations of war were all right in the eighteenth century because in those days nations fought total wars, but that declarations of war are outmoded today because now we fight limited wars for limited objectives and

a declaration of war would mislead our enemies as to the extent of our objectives. In 1789, people made the same argument that declarations of war are outmoded, but the framers still wanted to be sure that America does not get into war unless Congress declares war. Moreover, the concept of limited war is not a new one, but was particularly prevalent in the eighteenth century, when the Constitution was written. Finally, if a declaration of general war is undesirable because it would mislead our enemies, Congress has the power to declare a limited war, and if it wishes, Congress can state what the limited objectives are, can set limits on the amounts of force to be used, and can set time and area limits on the war. (K) History does not show that the Executive has the constitutional authority to fight the current war. For never before, with the exception of Korea, has the President fought a large scale and long sustained foreign war without a congressional declaration of war. Most Presidential uses of force abroad were minor uses of force; often there was no fighting or the fighting was shortlived; at other times, the use of force was to punish bandits or cattle rustlers. Such uses of force provide no precedent for the present large war. Lincoln's actions in the Civil War also provide no precedent for the present large war. For totally unlike the situation in regard to Viet Nam, Lincoln's actions were necessary to save the United States from certain and immediate destruction in an American Civil War; they were authorized by preexisting statutes which provided for the suppression of insurrection, and they were explicity ratified by Congress. The only precedent for the current war, then, is Korea. But one precedent cannot give the President the authority to fight the current war. First, even if there were many such precedents, the President would not have the necessary authority. In Youngstown, supra, this Court rejected the argument that prior Presidential seizures of businesses validated the seizure of the steel mills: the seizure of the mills was a legislative act and no amount of precedent could give the President the power to perform a legislative act. In the present case, no amount of precedent can give the

President the authority to perform the legislative act of deciding whether to fight a war. Second, with the advent and spread of atomic weapons, even small wars can lead to major holocausts. In these circumstances, it is more important than ever that the decision on whether to fight a war not be concentrated in a few hands in the Executive, but be dispersed among the 535 federal legislators. (M) That policies followed by prior Presidents have sometimes led to situations in which Congress felt it necessary to declare war is no grounds for saying that Presidents can fight a war without obtaining a declaration of war. Particularly is this true because today Congress and the Executive are not always in agreement as to when this nation should use force. (N) For rebuttals to other, less major government arguments, and for elaboration on the preceding rebuttals, petitioners respectfully refer the Court to Wormuth supra and Velvel supra.

It must also be noted that the question of whether the war is constitutional is not a political question but a justiciable one. For the constitutionality of the war does not depend on whether to fight in Viet Nam, but on which branch of government has the power to decide whether to fight in Viet Nam. Whether to fight is a political question involving matters of foreign affairs. But which branch of government has the power to decide whether to fight is a traditional judicial question; for, since Marbury v. Madison, it has been the role of the federal judiciary to decide which branch of government possesses particular powers. Petitioners here do not ask this Court to say that America should or should not fight in Viet Nam; they simply ask the Court to say that, for a large scale and long sustained war to be constitutional, the Congress must be the branch which decides that we are to fight the war and Congress must record its decision in a declaration of limited or general war.

That the constitutionality of the war is a justiciable question is made even clearer by referring to the standards laid down by Baker v. Carr, 369 U.S. 186 (1962), for determining the justiciability of a question. There is here a clear and

simple standard for adjudicating the controversy: the Executive cannot fight a long sustained and large scale war without a Congressional declaration of limited or general war. The question of which branch of government has the power to decide whether to fight a war is not textually and demonstrably committed to the political branches. On the contrary, it is a traditional judicial function to decide whether the Constitution gives particular powers to the Congress or the Executive. A judicial decision favorable to petitioners would express no disrespect for a coordinate branch of government, but would, on the contrary, express respect for Congress' constitutional power to declare war. There will be no embarrassments caused by a judicial decision, since a decision favorable to petitioners would only have the effect of placing in the Congress the power to decide whether to continue the war. Congress, were it so inclined, could immediately declare a limited war to be pursued by limited force for limited objectives; or, if it wished, it could even declare that, so as not to injure the chances that the peace talks will succeed, the level of American forces will not be increased or shall be lessened during the peace talks; or it could refuse to declare war and thereby bring peace to the country. And this case does not involve any policy question which is not suitable for judicial determination. On the contrary, the judiciary, as said above, traditionally decides whether the Constitution gives a particular power to Congress or to the Executive, and here petitioners ask the Court to decide only that the Constitution gives to Congress the power to decide whether America is to fight a large scale and long sustained war.[9]

5. P.L. 89-687(d)(1) says that, in deciding which Reservists to call to active duty, the Executive should give appropriate consideration to family responsibilities. It is obvious, however,

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[9] For further discussion of the justiciability of the constitutionality of the war, see Velvel, The War In Viet Nam: Unconstitutional, Justiciable and Jurisdictionaly Attackable; 16 Kan. L. Rev. 449, 479-485 (1968).

that the army gave utterly no consideration to petitioners' family responsibilities in deciding to call them to active duty. For petitioners have heavy family responsibilities even vis a vis other reservists: a large majority of petitioners are married and have children.

That the army gave no consideration whatsoever to petitioners family responsibilities is made even more clear by letters which Colonel Raymond T. Reid, of the office of the army's Chief of Legislative Liason, sent to Congressman Garner E. Shriver and Congressman Larry Winn, Jr. (Appendix, infra pp. 3A, 4A). In his letters, Colonel Reid made clear that the army's sole considerations in deciding whether to call petitioners to active duty were that the army felt we must not lower our resolve in the face of worldwide commitments and the communist challenge in Viet Nam, that as a result of the Tet offensive and the Pueblo incident increased demands were being placed on the army, that the active army had to be increased in numbers as quickly as possible, and that calling up Reserves such as petitioners would increase the active army more quickly than other means. It is apparent from Colonel Reid's letters that, directly contrary to P.L. 89-687(d)(1), petitioners' heavy family responsibilities were not considered at all in deciding whether to call petitioners to active duty.

6. P.L. 89-687, under which petitioners were called to active duty, was enacted in October, 1966. On June 30, 1967, most of the substance of P.L. 89-687(a), (c) and (d) was reenacted in P.L. 90-40, 10 U.S.C. 673(a). Petitioners contend that, by reenacting a major portion of P.L. 89-687, but not reenacting P.L. 89-687(e), the Congress implicitly repealed P.L. 89-687(e). Since 89-687(e) was the only provision of P.L. 89-687 under which petitioners could be called to active duty (see note 6 supra) the respondents did not have authority to call petitioners to active duty under P.L. 89-687.

7. The Court of Appeals should have granted petitioners' motion for a temporary injunctive order requiring respondents not to send petitioners outside the continental United States pending appellate review of the District Court's dismissal of petitioners' action. Under Rules 62(g) and 65(b) of the Federal Rules of Civil Procedure and Rule 8(a) of the Federal Rules of Appellate Procedure, an appellate court can grant a temporary injunction pending appeal when irreparable harm may result in the absence of such an injunction and when the District Court has refused to grant the relief requested of it. In the case at bar, the District Court had refused to grant the relief requested of it, and, in the absence of an injunction pending appeal, irreparable harm might result because petitioners could well be killed or seriously wounded in Viet Nam before having an opportunity to assert their rights in the appellate courts. And this is surely not a case where an injunction was unnecessary because petitioners could be indemnified for the harm which might befall them in the absence of an injunction pending appeal: there is no way to really indemnify a man who is killed or seriously wounded.

Moreover, in this case the competing equities[10] were heavily on petitioners' side, rather than on respondents' side, in regard to obtaining an injunction pending appellate review in the Fourth Circuit. Petitioners were raising substantial and important question of law, such as whether P.L. 89-687 unconstitutionally delegates power to the Executive, whether this statute deprives petitioners of due process because it impairs the obligations of the government's contract, and whether the war in Viet Nam is constitutional. Men who may be called on to render the supreme sacrifice ought to be able to litigate substantial and important questions in the appellate courts before being asked to risk their lives and well being. In other cases raising some of the same issues of

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[10] See Yakus v. United States, 321 U.S. 414, 440-441 (1944); Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 532 (1960); Breswick v. United States, 100 Law Ed. 1510, 1513 (1955) (opinion of Justice Harlan, Circuit Justice).

law as were raised by petitioners, Justice Douglas had enjoined the army from sending Reservists to Viet Nam pending a full Court decision on whether to continue such injunctions pending petitions for certiorari e.g. Morse v. Boswell, Berke v. McLaughlin and Felberbaum v. MacLaughlin. And finally, it was hardly crucial to the American war effort that the fifty seven petitioners in this case be sent to Viet Nam while their case was pending in the Court of Appeals. The United States has over five hundred thousand men in Viet Nam, and the presence or absence of fifty seven more men is going to make precious little difference to the outcome of the war. This, then, was not a case in which the Court of Appeals exercised a sound discretion in denying an injunction pending appeal, but a case in which such an injunction should certainly have been granted.

8. This Court clearly has jurisdiction to review both the Court of Appeal's denial of a temporary injunctive order and the substantive issues upon which that denial was based, substantive issues which are central to this case. The Court of Appeal's denial of an injunctive order was in effect a final judgment. This Court has continually stressed that whether a judgment is final depends not on technical considerations but on practical ones; and it has stressed that, in determining the finality of an order, it will look at the possibility of irreparable harm occurring, at the inconvenience and cost and injustice to the parties if the order is not regarded as final, and at whether it would be useful for a lower court to hold additional hearings before review is had in a higher court. Gillespie v. United States Steel Corp., 379 U.S. 148, 152-153 (1964); Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949); United States v. Wood, 295 F.2d 772, 777-778 (1961). These pragmatic tests make clear that the Court of Appeal's denial of an injunctive order was a final order. In

the absence of an injunction pending appellate review, petitioners are likely to suffer irreparable injury, since they may be killed or seriously wounded in Viet Nam before having a chance to test their rights in court. Any rights they may have would thus be completely nullified.

Moreover, to require petitioners to proceed further in the Court of Appeals would be to uselessly subject them to inconvenience and cost. For it is manifest that they cannot prevail in the Court of Appeals. After a hearing at which respondents were represented (Appendix infra, p. 11A), Circuit Judge Butzner stated that a temporary injunction must be denied because "the issues raised in this appeal are identical to those considered by the Court in Morse v. Boswell, No. 12. 738, 4th Cir. August 26, 1968, and for this reason the appellants' cause lacks equity." Morse v. Boswell was a Fourth Circuit decision on the merits in which the Court of Appeals rejected the contentions that P.L. 89-687 unconstitutionally delegated power to the Executive and that P.L. 89-687 unconstitutionally impaired the government's obligation of contract. In other words, Morse v. Boswell held against two of the major contentions made by the present petitioners, and it is Judge Butzner's opinion that petitioners' case lacks merit because of the Fourth Circuit judgment in Morse. Clearly, then, it is useless to require petitioners to proceed further in the Court of Appeals, where they would only incur added expense and inconvenience without hope of success.

As the foregoing shows, the Court of Appeals denial of an injunctive order is a final order which this Court has jurisdiction to review under 28 U.S.C. 1254(1). However, it should also be noted that this Court has jurisdiction even if the Court of Appeals denial of an injunctive order was not a final order. 28 U.S.C. 1254(1) provides that this Court can review a case in a Court of Appeals before or after a judgment in the Court of Appeals. Rule 20 of the Supreme Court Rules provides that, when a case pending in the Court of Appeals is

of imperative public importance and requires immediate settlement in the Supreme Court, this Court will grant review before a judgment in the Court of Appeals. The present case is of crucial public importance and requires immediate settlement in this Court. Thousands of Reservists called to active duty under P.L. 89-687 are scheduled to go to Viet Nam in the very near future. Petitioners are among these Reservists and the questions petitioners raise are intrinsically of the utmost importance to the law and to this country. One can hardly deny the critical nature of the question whether the Congressional power to call reservists to active duty may be delegated to the Executive without any standards whatsoever as to what foreign or domestic conditions need exist before the Executive can exercise the delegated power; i.e. one cannot deny the importance of the question whether the Congress may give the Executive total and unfettered discretion as to when to call reserves to active duty. Neither can one deny the crucial significance--significance both to the present day and to possible Executive actions of the future--of the question whether the Executive may fight a long sustained and large scale war without obtaining a Congressional declaration of limited or general war. Clearly, then, the Court should hear and decide the questions raised here without requiring further proceedings in the Court of Appeals. Especially is this true because, according to the best information available to petitioners' counsel, in the relatively near future petitions for certiorari will be filed in other cases by reservists who are raising some of the same major contentions raised by petitioners here. See Taylor v. McElroy, 360 U.S. 709, 710 (1959).

CONCLUSION

For the foregoing reasons, this petition for a writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

October 3 , 1968

A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO.

THOMAS W. McARTHUR, et. al, Appellants,

versus

CLARK, CLIFFORD, etc., et. al, Appellees.

O R D E R

(Argued September 25, 1968 Entered September 25, 1968)

Before Butzner, Circuit Judge.

Philip J. Hirschkop and Lawrence R. Velvel, for Appellants.
Michael Morchower and David Lowe, for Appellees.

Upon consideration of the motion for a temporary restraining order filed by the appellants,

IT IS ADJUDGED AND ORDERED:

1. This Court has jurisdiction pursuant to 28 U.S.C. §1292.

2. Consideration of the motion by a single judge of this Court is appropriate under Rule 62(c) and (g) of the Federal Rules of Civil Procedure.

And it appearing to the Court that the issues raised in this appeal are identical to those considered by the Court in Morse v. Boswell, No. 12,738, 4th Cir., August 26, 1968, and for this reason the appellants' cause lacks equity,

It is further ADJUDGED and ORDERED that this motion for a temporary restraining order is denied.

s/ John D. Butzner, Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

Richmond Division

THOMAS W. McARTHUR et. al, Plaintiffs, vs. CLARK CLIFFORD, etc., et. al, Defendants.	CIVIL ACTION NO. 5980-R

ORDER

This notice having come on upon motion of the plaintiffs and it appearing that this matter is substantially the same as the matter of Felberbaum et. al. vs MacLaughlin et. al. CA 5976-R which was argued before this court on September 23, 1968,

IT IS ORDERED that plaintiffs' motion for a temporary restraining order be and hereby is denied, that plaintiffs' motion for a preliminary injunction or in the alternative for a writ of Habeas Corpus be and hereby is dismissed.

Entered this 25th day of September 1968.

Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DEPARTMENT OF THE ARMY
Office Of The Secretary Of The Army
Washington, D.C. 20310

15 July 1968

Honorable Larry Winn, Jr.
House of Representatives
Washington, D.C. 20515

Dear Mr. Winn:

This is in reply to your inquiry concerning a letter from members of the 842d Quartermaster Company presently assigned to Fort Lee, Virginia.

The first concern expressed by the men of the 842d was "why were we called?" Please be assured that this was a matter of long and careful study by the Department of the Army. All of the ramifications were considered prior to arriving at the decision to mobilize selected units - a decision which we believe is in the best national interest. The worldwide commitments of the United States are such that the active Army can no longer fill these commitments. Even as peace talks continue with little apparent progress, the Communists have escalated their aggression in South Vietnam. To reduce our forces at this time or to lower our resolve in the face of this challenge would appear to be most unwise. So, once again, it has been necessary to call upon the Reserves to join their active partners in the Department of Defense, prepared to defend the rights of free people wherever they may be threatened.

The men also expressed an interest in learning of the final destination of the unit. Although the letter indicated otherwise the men of this unit have known this information since prior to leaving Kansas. I have been informed on 8 July that the company commander, Captain Thomas M. Mordaunt, briefed the company with this information as a part of the briefing prior to reporting to Fort Lee. Since arriving at Fort Lee, Captain Mordaunt has made this a part of his Command Information Hour which is conducted weekly, normally scheduled on Saturday morning. So the information requested by the letter has been available to the men since early May and has been the subject of weekly discussion periods led by the company commander.

I trust this information will be of assistance to you in replying to the letter.

Sincerely,

RAYMOND T. REID
Colonel, GS
Office, Chief of
Legislative Liaison

DEPARTMENT OF THE ARMY
Office Of The Secretary Of The Army
Washington, D.C. 20310

21 August 1968

Honorable Garner E. Shriver
House of Representatives
Washington, D.C. 20515

Dear Mr. Shriver:

This is in reply to your inquiry concerning questions posed by Specialist William R. Patterson from the 842d Quartermaster Company, Fort Lee, Virginia.

In January 1968, the Army took action to realign its force structure in accordance with its worldwide commitments. During this process a number of low-priority units were scheduled for inactivation and measures were taken to redistribute personnel and equipment from these units to other organizations. The 114th Quartermaster Company mentioned in the letter by Specialist Patterson was one of the low-priority units.

As a result of the Tet Offensive and Pueblo incident, increased requirements subsequently were placed upon the Army, both for units to be deployed to Southeast Asia and for strengthening strategic reserves positioned in the United States. The urgency of the situation dictated that the new commitments be met in the shortest possible time and a mobilization of Army Reserve and National Guard units became necessary.

Among the forces needed to meet the increased requirements were various units, including the 842d Quartermaster Company, of the type being prepared for inactivation from the active Army. A thorough study revealed that these active Army units, in preparation for inactivation, were now understrength in personnel and that many unit members were, under current Army policy, ineligible for reassignment to a combat zone. In view of this, it was apparent that a high state of combat readiness could best be attained by accelerating the inactivation and making equipment and facilities immediately available to deployable units called up from the Reserve Components. Personnel from the active Army units are to be reassigned, some to the mobilized units, based on their skills and existing vacancies. Through this action the Army can meet its early deployment commitments as well as strengthen its strategic reserves in minimum time.

The 520th Quartermaster Company currently stationed at Fort Lee, Virginia, at the time of the reserve call-up in May, had only 49% of its authorized strength. This unit's personnel consisted of Vietnam returnees who were non-deployable, and a large number of men with only a few days remaining prior to their discharge from the service. Our experience shows that to refill a unit of this type with replacement personnel who have no prior training would require over twice as long to reach a satisfactory state of readiness as a reserve unit of similar type. Due to the time factor of bringing the 520th up to a state of readiness, compounded by the world situation at the time, the Army recommended the call-up of the 842d Quartermaster Company.

Specialist Patterson should be assured that the mobilization of each Reserve unit called up during May was a subject of careful study by the Department of the Army. On the basis of our analysis, the 842d was better qualified than similar units available, and it was ordered to active duty to fill a specific Army need.

I trust this information will be of assistance to you in replying to this letter.

Sincerely,

RAYMOND T. REID
Colonel, GS
Office, Chief of
Legislative Liaison

SUPREME COURT, U. S.
NOV 4 1968
JOHN F. DAVIS, CLERK

No. 612

In the Supreme Court of the United States

OCTOBER TERM, 1968

THOMAS W. MCARTHUR, ET AL., PETITIONERS

v.

CLARK CLIFFORD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 613

THOMAS W. MCARTHUR, ET AL., PETITIONERS

v.

CLARK CLIFFORD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners, who are now serving in Viet Nam, are members of an Army reserve unit ordered to active duty under Section 101(e), P. L. 89-687. In challenging the validity of their call to active duty, they contend, *inter alia*, that P. L. 89-687 is an unconstitutional delegation of legislative power to the executive and impairs their enlistment contracts, and that they may not be sent to fight in an undeclared war in Viet Nam.

In the courts below, petitioners sought injunctive relief, or alternatively, a writ of habeas corpus. The district court denied the requested relief on the merits, and also refused to stay the military orders assigning petitioners to Viet Nam (Pet. App. 2A). Circuit Judge Butzner on September 25, 1968, refused to stay petitioners' military orders pending appeal (Pet. App. 1A). Petitioners then sought a stay from this Court of the military orders assigning them to Viet Nam which was denied by the Chief Justice on September 26, 1968, and denied by the full Court on October 8, 1968. In conjunction with their stay application to this Court, petitioners on October 7, 1968, filed the present petition for certiorari. After the Court of Appeals for the Fourth Circuit acted on the merits of the appeal of the district court's decision, and affirmed the district court's action denying any relief to them, petitioners filed an *Addendum* to their petition for certiorari to seek review of that action.

2. The reserve unit to which petitioners belong was called to active duty pursuant to Section 101(e) of P. L. 89-687, which provides:

> Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.

This statute does not unconstitutionally delegate legislative power to the President, nor lack adequate

standards. The authority given to the President [1] to order reserve units to active duty "when he deems it necessary" involves the exercise of his broad authority as Commander-in-Chief to determine whether the national security requires an increase in the size of the armed forces. Cf. *Bowles* v. *Willingham*, 321 U.S. 503; *Yakus* v. *United States*, 321 U.S. 414. Moreover, since the President is acting in that capacity rather than exercising legislative authority delegated by Congress, the statute presents no problem under the separation-of-powers doctrine.

P. L. 89-687 does not impair the obligations of petitioners' enlistment contracts. As petitioners note (Pet. 5), paragraph 53 of those contracts provides that they may be ordered to active duty "in time of war or National emergency declared by Congress, *or when otherwise authorized by law*" (emphasis added). P. L. 89-687 is a law which "authorized" their call to active duty. Moreover, all applicable statutes in effect at the time when petitioners signed their enlistment agreements must be considered as incorporated therein by reference. See, *e.g.*, *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 435. Among the statutes in effect at the time they enlisted was 10 U.S.C. 673, which provides that "[i]n time of national emergency declared by the President after January 1, 1953, *or when otherwise authorized by law*" the Secretary of Defense may "without the consent of the persons concerned, order any unit * * * in the Ready Re-

[1] He in turn has delegated this power to the Secretary of Defense and the latter to the Secretaries of the Army, Navy and Air Force.

serve * * * to active duty * * * for not more than 24 consecutive months" (emphasis added). P. L. 89-687 is exactly such a "law" as is contemplated by 10 U.S.C. 673. See *Winters* v. *United States*, 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, October Term, 1968, No. 263 Misc., October 14, 1968. Thus, the calling of petitioners to active duty pursuant to P. L. 89-687 did not violate their enlistment contracts.

3. Petitioners also contend that their being sent to fight an undeclared war in Viet Nam violates the Constitutional provision that only Congress can declare war. However, the questions which petitioners seek to raise are "political questions", and "are plainly the exclusive province of Congress and the Executive." *Luftig* v. *McNamara*, 373 F. 2d 664-665, 666 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A.D.C.), certiorari denied, 389 U.S. 934. Petitioners are asking judicial intervention in the Executive's conduct of foreign policy. As this Court said in *Johnsen* v. *Eisentrager*, 339 U.S. 763, 789:

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * *

4. Petitioners' remaining arguments are also untenable. Section 101(d) of P. L. 89-687 provides that "[i]n order to achieve fair treatment as between members in the Ready Reserve who are being considered

for active duty under this section, appropriate consideration shall be given to * * * family responsibilities * * *." It is clear from the statutory framework that this section only applies to the call-up of individual reservists under Sections 101(a) and 101(b) of P. L. 89-687. Family responsibilities are obviously not an "appropriate consideration" in determining which reserve *units* to order to active duty under Section 101(e).

The argument that the Military Selective Service Act of 1967, P. L. 90-40, 81 Stat. 100, repealed P. L. 89-687 is frivolous. P. L. 90-40 merely codified certain portions of P. L. 89-687 as 10 U.S.C. 673a, and did not affect the remainder of P. L. 89-687. See 81 Stat. 105.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1968.

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THE UNITED STATES

OCTOBER TERM, 1968

NO. 613

Thomas W. McArthur et. al.,.

Petitioners,

vs.

Clark Clifford, Secretary of Defense, and
Stanley Resor, Secretary of the Army et. al,

Respondents.

REPLY TO RESPONDENTS' MEMORANDUM IN OPPOSITION TO THE PETITION FOR CERTIORARI

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In their memorandum in opposition to the petition for certiorari, the respondents make the following statements:

> The reserve unit to which petitioners belong was called to active duty pursuant to Section 101(e) of P.L. 89-687, which provides:
>
> > Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period not to exceed twenty-four months.
>
> This statute does not unconstitutionally delegate legislative power to the President, nor lack adequate standards. The authority given to the President to order reserve units to active duty "when he deems it necessary" involves the exercise of his broad authority as Commander-in-Chief to determine whether the national security requires an increase in the size of the armed forces. Cf. Bowles v. Willingham, 321 U.S. 503; Yakus v. United States, 321 U.S. 414. Moreover, since the President is acting in that capacity rather than exercising legislative authority delegated by Congress, the statute presents no problem under the separation-of-powers doctrine.

Petitioners wish to explicitly call this Court's attention to the full import of what respondents are saying in the above quotation. Respondents are claiming that, at least insofar as

calling Reservists to active duty is concerned, the power to determine what sized armed forces are necessary to the national security is not a legislative power, but a power which resides in the Commander-in-Chief. Respondents are claiming that, as Commander-in-Chief, the President can call Reservists to active duty whenever he thinks our security requires it, and his action would involve no separation of powers problem because he would not be exercising a legislative power.

The implications of Respondents' claim are enormous, to say the least. Since Respondents say that, in regard to calling up Reservists, the power to decide what sized army we shall have is not a legislative power but a Presidential power, it is clear that under their claim the President could call Reservists to active duty even if there were no statute providing for this. Moreover, the President could do so in his sole discretion and without any guidelines. In regard to calling Reservists to active duty, then, Respondents' claim comes down to this: whenever the President thinks he needs a bigger army, he can have a bigger army. Such a claim goes a long way towards destroying the constitutional balance which explicitly gives Congress the power to raise armies, to provide for navies, and to raise taxes for the common defense. And it is but a relatively short step from (1) claiming that, even in the absence of statutory authority, the President as Commander-in-Chief can call Reservists to active duty whenever he thinks our security requires a bigger army, to (2) claiming that, even in the absence of statutory authority, the President as Commander-in-Chief can draft men whenever he thinks our security requires a bigger army.*

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*Lest one think that it is unthinkable that any President would ever make the latter claim, petitioners note that President Truman made a very analogous claim in Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952). In that case the government claimed that, even in the absence of statutory authority, the President as Commander-in-Chief could seize private industry when he thought it necessary for the nation's security.

The extremely broad nature of Respondents' claim serves to reemphasize a point which Petitioners made in their Petition For Certiorari. While this case involves several very important legal issues, the deepest and most fundamental question here is whether, in the particular areas of military and foreign affairs involved, the Presidency is now so powerful that it is subject to no law but its own desires, i.e. whether the Presidency is above the law. Petitioners respectfully suggest to this Court that this deep and fundamental question, as well as several of the legal questions presented in this case, are critical to the future of the country and should be decided by this Court.

Respectfully submitted,

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